Filed 5/1/12 In re Alexis V. CA4/1

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

In re ALEXIS V., a Person Coming Under the Juvenile Court Law.	
THE PEOPLE, Plaintiff and Respondent, v. ALEXIS V., Defendant and Appellant.	G044889 (Super. Ct. No. DL036398) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Donna L. Crandall and Jacki C. Brown, Judges. Affirmed.

Janice R. Mazur, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Scott C. Taylor and Marissa Bejarano, Deputy Attorneys General, for Plaintiff and Respondent.

Alexis V. appeals from a judgment after a the trial court sustained a petition finding he resisted and obstructed a police officer and declared him a ward of the court pursuant to Welfare and Institutions Code section 602. Alexis argues the juvenile court erred in denying his discovery motions pursuant to *Brady v. Maryland* (1963) 373 U.S. 83, and Penal Code section 1054 et seq. His contentions have no merit, and we affirm the judgment.

FACTS

On November 7, 2010, at approximately 12:18 a.m., Costa Mesa Police Department Officers Erik Rosado and Christopher Brunt stopped a vehicle on suspicion of drunk driving. Alexis's step-father was driving the car; Alexis, his mother, and his younger brother and sister were also in the car. The officers arrested the driver. Because there was not another licensed driver in the car, Rosado called a tow truck.

Brunt told Alexis the car was going to be towed. Alexis was upset and told Brunt the car did not need to be towed. Alexis asked Brunt if he could get some items out of the car, and Brunt said he could. Brunt heard Alexis say to his younger sister, "'See, this is why I fucking hate cops.'"

While the tow truck operator was securing the car, Alexis walked to the passenger side of the patrol car to speak with his step-father; Rosado told him to leave. Brunt was sitting in the driver's side of the patrol vehicle. Alexis walked to the patrol car frantically and said, "'Why do you have to tow the fucking car, homey?'" Brunt got out of the car and told Alexis to leave, but he walked towards Brunt. Brunt put his hand on Alexis's shoulder to turn him around and direct him away. Alexis walked away, turned back around, and lunged or swung at Brunt. Brunt put up his hands to stop Alexis from coming closer to him. Alexis shoved Brunt in the chest. Brunt grabbed his arms and restrained Alexis against the car. Alexis struggled to break free. Because he resisted arrest, Brunt pushed Alexis to the ground. Rosado rushed over to help. Alexis's mother

tried to pull the officers off her son. Brunt told Alexis they would tase him if he continued to resist arrest. Alexis paid them no heed. Brunt tased Alexis twice.

On November 9, 2010, a petition subsequent[1] alleged Alexis committed a misdemeanor battery on a peace officer (Pen. Code, § 243, subd. (b))[2] (count 1), and resisted and obstructed an officer (§ 148, subd. (a)(1)) (count 2).

The following day, Alexis was ordered detained at juvenile hall. The next week, an immigration hold was placed on him.

A few weeks later, Alexis filed a motion for discovery of peace officer personnel records pursuant to *Pitchess v. Superior Court* (1974) 11 Cal.3d 531. The Costa Mesa Police Department opposed the motion. Alexis's counsel filed a declaration supporting his motion.

After an in camera review of peace officer personnel records, the juvenile court ordered the release of the contact information of complainants and witnesses of three incidents concerning Brunt and one incident regarding Rosado.

In January 2011, a second petition subsequent alleged Alexis drove a motor vehicle without a valid driver's license (Veh. Code, § 12500, subd. (a)) (count 1), and misdemeanor hit and run causing property damage (Veh. Code, § 20002, subd. (a)) (count 2).

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[1] Although not directly relevant to this appeal, before the incident at question here, a January 2010 petition alleged Alexis committed felony gang-related vandalism in an amount under $400 (Pen. Code, §§ 594, subds. (a), (b)(2)(A), 186.22, subd. (d)) (count 1). The petition alleged Alexis committed count 1 for the benefit of a criminal street gang within the meaning of section 186.22, subdivision (d). The following month at a pre-trial hearing, the juvenile court ordered the petition amended by interlineations to add count 2, misdemeanor vandalism in an amount under $400 (Pen. Code, § 594, subds. (a), (b)(2)(A)) (count 1). Alexis admitted count 2, and the court dismissed count 1. The court found count 2 true beyond a reasonable doubt, declared Alexis a ward of the court, and ordered him to complete 17 days of community service.

[2] All further statutory references are to the Penal Code, unless otherwise indicated.

At a pre-trial hearing on February 4, 2011, Alexis's counsel informed the court that she had informally requested discovery of the previous November and the Costa Mesa Police Department had not produced the audio tape. Counsel informed the court she would be filing a formal discovery motion.

Four days later, Alexis filed a formal motion for discovery of video recordings of the incident and audio recordings of Brunt's interview with Alexis.

At a hearing before Judge Jacki Brown, Brunt testified the Costa Mesa Police Department uses Digital Audio Recording (DAR) devices. Brunt stated that at the police station, he recorded his interview with Alexis with his DAR device. He later downloaded the interview into the server through the computer. Brunt also memorialized the interview in his police report. Brunt testified he first learned of the request for the audio file the previous week. He explained that when someone in the records department could not retrieve the audio file, that person contacted him. Brunt claimed he tried but was unable to locate the audio file. Brunt stated the department's information technology person was unable to locate the audio file but that someone at the manufacturer was trying to locate the file. Brunt also testified there was video and audio recording inside his patrol vehicle. There was a video recording of what occurred outside of the vehicle and audio recording of what was said inside the vehicle. The juvenile court granted the motion, reasoning any audio or video recordings of the incident were pertinent and discoverable and ordered Brunt to produce any recordings. The court also ordered Brunt to produce a statement explaining the condition of the audio recording or why it could not be retrieved from the computer.

At a hearing the following week before Judge Donna Crandall, Alexis's counsel indicated Brunt provided her with a letter from the DAR manufacturer's technician that stated the audio recording of the interview could not be retrieved from the computer system. Counsel had been provided with the video recording from the patrol vehicle. Counsel represented that in the letter, the technician stated the last event on the

computer concerning the audio file was on the day of the incident and the issue could have been caused because of a problem with the computer system, "as opposed to any wrongdoing from the officer." Counsel also stated the technician could not determine whether it was a computer failure or Brunt's fault.[3] Counsel moved to dismiss the case based on federal and state discovery violations. The court denied the request, reasoning neither side had access to Alexis's statements to Brunt.

The matter came on for trial. In addition to Brunt's and Rosado's testimony, the petitioner offered the testimony of the tow truck driver, Jonathan Vantrease. Vantrease testified he saw Brunt behind Alexis with both hands on Alexis's shoulders. He saw Alexis push back into Brunt causing Brunt to be pushed into the patrol car. Vantrease did not see anything before Alexis pushed Brunt. He did see the second officer put Alexis on the ground, face down, with his hands behind his back. Vantrease saw Alexis struggling but he did not hit or kick the officers. He also saw the officer fire the taser at Alexis.

At the close of the petitioner's case-in-chief, the juvenile court denied Alexis's motion to dismiss count 2 but granted it as to count 1, misdemeanor battery on a peace officer. The court, however, concluded there was sufficient evidence to support simple assault as to count 1.

Christopher Rotchford testified for Alexis. Rotchford testified that in October 2007 he was arrested for driving under the influence of alcohol. Rotchford stated that at the police station, he was handcuffed when Brunt and Rosado shoved him down onto the concrete without bracing him; he injured his head, elbow, knee, and hip. Rotchford explained he had admitted driving under the influence and been cooperative the entire time. He stated that when he was on the ground, Brunt asked him, "'Why are you resisting?'" Rotchford filed a complaint. He learned there were video cameras in the

[3] Unfortunately, the technician's letter is not part of the record on appeal.

room where he was pushed but when he tried to obtain a copy of video, "[t]he video mysteriously disappeared."

Alexis testified on his own behalf. Alexis testified that during the incident he acted primarily as an interpreter for his mother and the police officers. He denied cursing or making any vulgar statements to Brunt. Alexis explained he approached the patrol car with his mother to ask the officers a question. He stated that when he grabbed his mother to leave, Brunt grabbed him and pushed him against the vehicle, and he fell to the ground. Alexis claimed he did not struggle or resist arrest. He said the officers did not warn him that they were going to tase him.

Two witnesses testified to Alexis's peaceful nature.

After the close of evidence, the court ruled the petitioner had proved count 2 beyond a reasonable doubt but the petitioner had not proved count 1 beyond a reasonable doubt based on the inconsistencies in the witnesses' testimony.

Alexis later admitted the allegations in the second petition subsequent. The court continued Alexis a ward of the court, and based on time served, the court ordered Alexis released on probation. He appealed.

DISCUSSION

"The People have a constitutional and a statutory duty to disclose information to the defense. [Citations.] The constitutional duty arises under the due process clause of the United States Constitution and requires the prosecution to disclose any material evidence exculpatory of the defendant irrespective of the good faith or bad faith of the prosecutor. [Citations.] There are three components of a *Brady* violation: (1) the evidence must be favorable to the accused, meaning it is exculpatory, or impeaching; (2) the evidence must have been willfully or inadvertently suppressed by the State; and (3) prejudice must have ensued because the evidence was material to the issue of guilt and innocence of the accused by establishing a reasonable probability of a different result. [Citation.] The materiality of the evidence '"must be evaluated in the

context of the entire record."' [Citations.]" (*People v. Bowles* (2011) 198 Cal.App.4th 318, 325 (*Bowles*).)

The California criminal statutory discovery scheme (§ 1054 et seq.) requires the prosecution disclose specified information to the defense, including any "exculpatory evidence," and "reports or statements of experts made in conjunction with the case." (§ 1054.1, subds. (e) & (f).) Absent good cause, such evidence must be disclosed at least 30 days prior to trial, or immediately if discovered or obtained within 30 days of trial. (§ 1054.7.) The trial court has broad discretion to fashion a remedy in the event of a discovery abuse to ensure that the defendant receives a fair trial. (*Bowles, supra,* 198 Cal.App.4th at p. 326.) The trial court may enforce the discovery statutes by ordering "immediate disclosure, contempt proceedings, delaying or prohibiting the testimony of a witness or the presentation of real evidence, continuance of the matter, or any other lawful order." (§ 1054.5, subd. (b).) If these sanctions have been exhausted, the trial court may also prohibit the testimony of a witness. (§ 1054.5, subd. (c).) Finally, if required to do so by the Constitution of the United States, the trial court can dismiss a charge. (*Ibid*.)

Here, Alexis filed a motion to dismiss the charges. He did not request any other remedy. Thus, in this case, dismissal was appropriate only if the principles set forth in *Brady* and its progeny require it. We conclude they did not.

The Attorney General concedes the audiotape of the interview "would have been at least marginally relevant to bolster [Alexis's] credibility." Thus, the evidence would have likely been favorable to Alexis because his statements immediately after the incident would have bolstered his testimony at trial. (*People v. Ashraf* (2007) 151 Cal.App.4th 1205, 1212 [evidence favorable if it helps defendant or hurts prosecution].) Second, there is no dispute the petitioner did not disclose the audiotape of the interview to Alexis's counsel and thus, the evidence was suppressed.

"'Evidence is material [under *Brady*] if there is a reasonable probability its disclosure would have altered the trial result. [Citation.] Materiality includes consideration of the effect of the nondisclosure on defense investigations and trial strategies. [Citations.]'" (*People v. Verdugo* (2010) 50 Cal.4th 263, 279.) "Materiality . . . requires more than a showing that the suppressed evidence would have been admissible [citation], that the absence of the suppressed evidence made conviction 'more likely' [citation], or that using the suppressed evidence to discredit a witness's testimony 'might have changed the outcome of the trial' [citation]. A defendant instead 'must show a "reasonable probability of a different result."' [Citation.]" (*People v. Salazar* (2005) 35 Cal.4th 1031, 1043.) "It is a probability assessed by considering the evidence in question under the totality of the relevant circumstances and not in isolation or in the abstract. [Citation.]" (*People v. Dickey* (2005) 35 Cal.4th 884, 907-908 (*Dickey*).) "[T]he Constitution is not violated every time the government fails or chooses not to disclose evidence that might prove helpful to the defense. [Citation.]" (*Kyles v. Whitley* (1995) 514 U.S. 419, 436-437.)

Here, although it is troubling the Costa Mesa Police Department could not produce the audiotape of Brunt's interview with Alexis, it is not reasonably probable its disclosure would have altered the result of the trial. The juvenile court heard Alexis's testimony that he did struggle or resist arrest. Alexis testified that when he tried to grab his mother, Brunt grabbed him and pushed him against the vehicle. Vantrease admitted he did not witness the entire event because he was securing the vehicle to the tow truck, but he testified he saw Brunt behind Alexis with both hands on his shoulders and Alexis pushed back into Brunt causing Brunt to be pushed into the patrol car. Vantrease did not see Alexis use his hands to push Brunt. Alexis's post-arrest interview statements to Brunt to the affect Brunt pushed him first was not material because it would have added little to the cumulative impact of the other evidence. (*Dickey, supra,* 35 Cal.4th at p. 908.)

Although we conclude there was no *Brady* violation and thus the juvenile court properly denied Alexis's motion to dismiss, we caution the Costa Mesa Police Department to take careful measures to store its electronic evidence. In this case, it is undisputed the Costa Mesa Police Department did not disclose exculpatory evidence to the defense. Whether it was because of a computer failure or officer error or malfeasance we do not know. The complainant in another excessive force case against Brunt testified in this case that the videotape of his arrest, which may have corroborated his complaint, "mysteriously disappeared." We recognize no electronic system is perfect. But two citizens have complained an officer used excessive force and electronic evidence in both cases is unavailable. We also recognize that in this case, the electronic evidence does not concern the actual events in question. Nevertheless, we strongly encourage the Costa Mesa Police Department to review it policies, practices, training methods, and systems to ensure electronic evidence is properly preserved.

DISPOSITION

The judgment is affirmed.

O'LEARY, P. J.

WE CONCUR:

RYLAARSDAM, J.

IKOLA, J.